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No. 91-483

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAUL DELO, Superintendent,
Potosi Correctional Center,

Petitioner,

v.

KENNETH L. KENLEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

THIS COURT SHOULD NOT GRANT CERTIORARI HEREIN, BECAUSE THIS CASE PRESENTS NO SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO EXERCISE ITS DISCRETIONARY JURISDICTION.

II.

THE COURTS OF APPEAL MUST APPLY THE GUIDELINES OF STRICKLAND v. WASHINGTON TO THE FACTS AND CIRCUMSTANCES OF EACH INDIVIDUAL CASE TO DETERMINE EFFECTIVENESS OF COUNSEL.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT 3

I. This Court Should Not Grant Certiorari Herein, Because This Case Presents No Special And Important Reasons For This Court To Exercise Its Discretionary Jurisdiction. 3

II. The Courts of Appeal Must Apply The Guidelines Of Strickland v. Washington To The Facts And Circumstances Of Each Individual Case To Determine Effectiveness Of Counsel. . 6

A. The Eighth Circuit Properly Applied the Cause Prong of the Strickland Test to the Facts of This Case 7

B. The Eighth Circuit Properly Found Respondent had been Prejudiced 10

CONCLUSION 14

CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

CASES — PAGE

Burden v. Zant, ___ U.S. ___, 111 S.Ct. 862, 112 L.Ed.2d 962 (1991) 4

Chambers v. Armontrout, 907 F.2d 825 (8th Cir.) (en banc), cert. denied, 111 S.Ct. 369, 112 L.Ed.2d 331 (1990) 10, 13

Duckworth v. Serrano, 454 U.S. 1, 102 S.Ct. 18, 70 L.Ed.2d 1 (1981) 4

Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991) reh. denied Nos. 89-2915, 90-1015 (August 13, 1991) . . . . . passim

Kenley v. State, 759 S.W.2d 340 (Mo. App. 1988) 9

Lawrence v. Armontrout, 900 F.2d 127 (8th Cir. 1990) 11

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 43 S.Ct. 422, 67 L.Ed. 712 (1923) 4

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955) 4

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) . . . . . passim

Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982) 4

Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) 5

United States v. Gray, 878 F.2d 702 (3rd Cir. 1989) 10

STATUTES

28 U.S.C. § 2254 . . . . . 4, 6

RULES

Rule 10.1, Rules of the United States Supreme Court 3, 4

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STATEMENT OF THE CASE

Respondent is compelled to correct and clarify Petitioner's Statement of the Case by adding facts omitted by Petitioner. This case is fact intensive and specific, involving a new lawyer who completely failed to investigate mitigating evidence and failed to present mitigating evidence in the death penalty phase of Respondent's trial. Petitioner's rendition of the facts of Respondent's three hour crime spree is a transparent attempt to garner sympathy for his position, and has no place in a Petition

for Writ of Certiorari. It is not surprising that once again Petitioner declines to focus on trial counsel's representation of Respondent. At the time of his appointment to this capital case, trial counsel was a new county public defender, just three months out of law school with no trial experience. The capital trial occurred six months after appointment when counsel had tried one burglary case. The Eighth Circuit aptly summarized trial counsel's abysmal performance during the guilt phase of the capital trial and the noncapital trial and trial counsel's constitutionally deficient performance in the sentencing phase of the capital trial as follows:

> Prior to the capital trial, counsel waived an automatic change of venue despite the wide publicity Kenley's crimes had received. During voir dire, counsel performed little inquiry into the attitudes of the jurors toward capital punishment and into jurors' ability to consider a range of possible punishments. Counsel waived opening statement and only asked thirty-six cross-examination questions of eight out of twenty-six witnesses. Counsel did not challenge somewhat inaccurate descriptions of Kenley and his vehicle, did not challenge ambiguities and inconsistencies in witness statements, and did not object to a surprise pathologist's report. Counsel also did not object to the admission of cumulative and potentially prejudicial testimonial evidence regarding Kenley's identity, the victim's family, and other weapons unrelated to the crime. Counsel made a short, unremarkable closing argument and submitted no jury instructions. Capital murder, second degree murder and manslaughter instructions were given by the court.
>
> At the capital sentencing, counsel submitted no mitigating evidence although Kenley's age was stipulated and the prosecution introduced Kenley's single prior conviction. Counsel unwittingly made reference to Kenley's failure to testify and did not object to evidence regarding the deterrent effect of the death penalty introduced by the prosecution. Many similar events occurred (or failed to occur) at Kenley's noncapital trial. In

> addition, counsel made no closing argument and did not move for severance of charges (robbery, kidnapping, assault and theft). By the close of the noncapital trial, counsel had accepted a job with the prosecuting attorney's office.

Kenley v. Armontrout, 937 F.2d 1298, 1300-1301 (8th Cir. 1991).

The undivided panel's twenty-four page opinion is a well-reasoned, well-written discourse of Respondent's claims of failure to investigate and failure to present mitigating evidence in the state court. The Eighth Circuit's opinion also demonstrates the prejudice suffered by Respondent in the sentencing stage of his capital trial by trial counsel's ineffective performance.

ARGUMENT

I. This Court Should Not Grant Certiorari Herein, Because This Case Presents No Special And Important Reasons For This Court To Exercise Its Discretionary Jurisdiction.

Petitioner clearly has not demonstrated that the opinion of the panel warrants certiorari. Rule 10.1, Rules of the United States Supreme Court, clearly provides that this Court's certiorari review is discretionary, and should be exercised "only when there are special and important reasons therefor." Rule 10.1, Rules of the Supreme Court of the United States. The purpose of the writ of certiorari is not to correct possible errors made by federal courts of appeal. This Court has held:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is real and embarrassing conflict of opinion and authority between the circuit courts of appeals.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 712 (1923). Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79, 75 S.Ct. 614, 99 L.Ed. 897 (1955).

Petitioner has not shown, nor even alleged, that special and important reasons exist for this Court to exercise its jurisdiction. Moreover, Petitioner almost concedes that this case does not meet the standards of Rule 10. This case does not involve a conflict between the circuits or a question of an unsettled principle of federal law. Instead, Petitioner argues that this Court should grant certiorari to deter misconduct by the federal Courts of Appeals that erroneously apply existing federal law. Petition at 11. In support of this argument, Petitioner cites Burden v. Zant, ___ U.S. ___, 111 S.Ct. 862, 112 L.Ed.2d 962 (1991); Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982); and Duckworth v. Serrano, 454 U.S. 1, 102 S.Ct. 18, 70 L.Ed.2d 1 (1981).

Each of the three cases cited by Petitioner involve the blatant failure by the lower courts to follow the clear dictates of federal statutes. In Burden and Sumner, the lower courts disregarded the presumption of correctness doctrine embodied in 2254(d) without citing any authority or any discussion of the application of any exception as required in that statute. In Duckworth, the lower court disregarded the exhaustion requirement without citing any authority or any established legal exception that would excuse the failure to exhaust in that case. In contrast, in Respondent's case, the Eighth Circuit clearly

followed the Strickland cause and prejudice analysis and merely applied it to the facts of Respondent's case. It, therefore, would stretch the imagination to compare what the Eighth Circuit did in Kenley with the three previously mentioned cases.

Petitioner next argues that the purpose of federal habeas corpus is to deter state court misconduct in interpreting federal constitutional law, citing Teague v. Lane, 489 U.S. 288, 306, 109 S.Ct. 1060, 1072-1073, 103 L.Ed.2d 334 (1989), and tries to extend the purpose of the writ of certiorari to include deterring misconduct of the federal courts citing no authority. Petitioner quotes Teague v. Lane out of context. The passages out of Teague regarding deterrence of state court misconduct embody Justice Harlan's view that retroactive application of new constitutional laws undermine the state court's role in applying the law as it existed at the time of a litigant's trial and state appeals. Justice Harlan is quoted in Teague as follows:

> The threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards. In order to perform this deterrence function, . . . the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place.

Teague v. Lane, 489 U.S. 288, 306, 109 S.Ct. 1060, 1073, 103 L.Ed.2d 334 (1989).

What is meant by "deterrence," as mentioned in Teague and quoted by Petitioner, is that the state courts properly follow and apply existing federal constitutional law during state proceedings. There is no requirement that a federal court

specifically find misconduct on the part of the state courts to justify habeas relief.

Petitioner further argues that because there is no allegation of state court misconduct in Kenley's case and because Kenley had a hearing on these issues in state court, this case is beyond the scope of federal habeas relief. Petitioner's argument is inconsistent with the plain language of 28 U.S.C. § 2254, which provides that a federal court "shall entertain an application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States." Therefore, Petitioner's argument is clearly an attempt to circumvent the plain language of § 2254's provisions on the scope of federal habeas relief. Accordingly, the conclusory statements made by Petitioner do not demonstrate a question of exceptional importance or a conflict between the law of the circuits and this Court should not grant Petitioner's Petition for Writ of Certiorari.

II. The Courts of Appeal Must Apply The Guidelines Of Strickland v. Washington To The Facts And Circumstances Of Each Individual Case To Determine Effectiveness Of Counsel.

The case at bar presents a unique set of circumstances, unlike those in any case cited by Petitioner or Respondent throughout this litigation. Respondent was tried and convicted of capital murder and sentenced to death. His death sentence was set aside by the United States Court of Appeals for the Eighth Circuit.

The bulk of Petitioner's argument is that the Eighth Circuit erroneously applied the cause and prejudice standards of Strickland v. Washington. The Eighth Circuit's decision that Respondent's trial counsel was ineffective simply applied to the facts herein this Court's standards as set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court has often pointed out, there is no clear rule as to what constitutes effective or ineffective assistance of counsel. Ineffectiveness in each case must be decided on the basis of its own facts and circumstances. Id. at 688-690. This Court has already set parameters to guide the lower courts in making this determination. Id. These parameters were clearly followed by the Eighth Circuit in Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991) reh. denied Nos. 89-2915, 90-1015 (August 13, 1991), and do not need further clarification by this Court. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). It is difficult to see how the Eighth Circuit's decision in this case could have a broad application or importance beyond the unique factual limits of the case at bar.

A. The Eighth Circuit Properly Applied the Cause Prong of the Strickland Test to the Facts of This Case.

Petitioner argues that the Eighth Circuit failed to give proper deference to the presumption that trial counsel provided effective assistance and avoid the "distorting effect of hindsight." This assertion is totally without merit. At the beginning of its Strickland analysis in the Kenley opinion, the

United States Court of Appeals for the Eighth Circuit quoted language from Strickland:

> With the performance test, we start by presuming that counsel provided effective assistance, and we do not use hindsight to question counsel's performance.

Kenley v. Armontrout, 937 F.2d at 1303 (quoting Strickland v. Washington at p. 687-688). Again, at the conclusion of its Strickland analysis, the Eighth Circuit panel quotes from Strickland as follows:

> The state argues and the district court infers that recent case authority in our circuit does not support the legal conclusions we reach in this case, and suggests that our existing authority creates an almost insurmountable barrier to habeas relief. We disagree with this general characterization of our case authorities although, as a practical matter, the strong presumption in favor of counsel and the heavy burden on the defendant established by the Supreme Court in Strickland means determination of ineffective assistance of counsel such as in the present case will likely occur infrequently.

Kenley v. Armontrout, 937 F.2d at 1309. In light of these specific quotations of Strickland by the Eighth Circuit panel, it is clear that the Eighth Circuit did consider and correctly apply the performance prong of the Strickland test.

The parameters set out in Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), for measuring the effectiveness of counsel's performance, apply with particular relevance to the instant case.

> Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland v. Washington, 466 U.S. 668, 690-691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984). Characterizing an act or omission as trial strategy puts the stamp of reasonableness on it, and makes it "virtually unchallengeable." However, it is clearly the intent of Strickland that the question of reasonableness is a legal one. The State of Missouri suggests the federal reviewing court can't make that determination, contrary to Strickland. "Ineffectiveness is not a question of 'basic, primary or historical fact' (citations omitted) . . . it is a mixed question of law and fact." Strickland v. Washington, supra, at 689. Petitioner states that the Court of Appeals did not find misconduct by the state court. Petition for Writ at p. 13. The Eighth Circuit properly disagreed. Kenley, 937 F.2d at 1308.

Moreover, the record of the state proceedings on Respondent's 27.26 motion did not fairly support the state court's determination that trial counsel's decision not to present mitigating evidence was trial strategy. The record was limited to the consideration of the evidence Dr. Manion and Mrs. Crownover could have presented. No consideration was given to the other mitigating evidence that was available. The court did not take into account psychiatric evidence from the military, nor did trial counsel request appointment of a psychiatrist. The state court specifically commented on the fact that there was a conflicting report only three months old which revealed no mental defect which was contrary to the six year old information. See Kenley v. State, 759 S.W.2d 340, 346 (Mo. App. 1988). The Eighth Circuit noted:

> In sum, the state court fact findings were incomplete and counsel's decision to stop investigating was unreasonable because his belief that mitigating evidence was too old and insubstantial resulted from his failure to follow available leads to more recent and persuasive mitigating evidence. Counsel's investigation fell short of what was required in this case.

Kenley, 937 F.2d at 1308.

Each case with an ineffectiveness claim must be judged on its own facts and circumstances. Strickland v. Washington, 466 U.S. 668, 689-690, 104 S.Ct. 2052, 2065-2066, 80 L.Ed.2d 674 (1984). That is precisely what was done in this case. The Eighth Circuit noted:

> Here it was not a reasonable strategy that led counsel not to investigate, but lack of thoroughness and preparation. "Counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made." Chambers, 907 F.2d at 835 (quoting United States v. Gray, 878 F.2d 702, 711 (3rd Cir. 1989)).

Kenley, 937 F.2d at 1308. The United States Court of Appeals for the Eighth Circuit made a determination, pursuant to Strickland, that Respondent's trial counsel limited his investigation in a manner not supported by a reasonable professional judgment. Id. The court makes clear that this decision is unreasonable in view of the unique and cumulative facts of this case. Id.

B. The Eighth Circuit Properly Found Respondent had been Prejudiced.

Petitioner further argues that the Eighth Circuit misapplied the prejudice prong of the Strickland test, however, in the process Petitioner completely misstates the law.

The court clearly and correctly followed Strickland, finding that if evidence had been presented, there is a reasonable

probability that "the result would have been different." Kenley v. Armontrout, 937 F.2d at 1308. Strickland v. Washington, 466 U.S. 668, 694-695, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In discussing the prejudice prong, the Eighth Circuit stated that: "we have demonstrated that the state court fact finding was not supported by the record." Kenley, 937 F.2d at 1308. Ineffective assistance of counsel is a mixed question of law and fact. The Eighth Circuit was not bound by the state court's findings on this issue. See Lawrence v. Armontrout, 900 F.2d 127 (8th Cir. 1990). The Eighth Circuit stated:

> We believe there is a reasonable probability Kenley would not have received a death sentence if some of the mitigating evidence had been presented.

Kenley, 937 F.2d at 1308.

After full briefing and argument and review of the entire record, the Eighth Circuit unanimously concluded that this evidence was mitigating and substantial and that it undermined their confidence in the outcome of the sentencing phase under the proper application of the Strickland test.

> We have demonstrated that the state court fact finding was not supported by the record because the potential mitigating evidence was substantial. We do not agree as a matter of law that there was no prejudice because the other evidence would have significantly worsened the perception of Kenley's character. Rather, we believe the testimony would have put the aggravating evidence in context along with the mitigating evidence.
>
> The state courts' conclusion on this issue was based on counsel's beliefs that the mitigating evidence would be unpersuasive to a jury in light of Dr. Parwatikar's report and additional potentially aggravating information. We do not believe reasonably effective counsel would have reached the same conclusion if, in addition to reviewing Crownover's records, counsel would have interviewed Dr. Manion and Dr. Richards or

> at least reviewed their reports, reviewed Kenley's military file, and interviewed family witnesses concerning Kenley's history and his condition the morning after arrest. This additional information would have been more than enough to mount a challenge to Parwatikar's report . . . Also, Kenley's alcohol problems were well documented by all doctors, and when combined with other evidence from the sheriff, news accounts and family testimony, would have been probative mitigating evidence of intoxication.

Kenley v. Armontrout, 937 F.2d at 1308. Further, Petitioner's disagreement with the unanimous conclusion of the Eighth Circuit panel as to the weight of the mitigating evidence would not justify the Supreme Court's exercise of its discretionary review under a writ of certiorari.

Finally, Petitioner seems to argue that the panel opinion will have an adverse effect on other capital habeas litigation in the Eighth Circuit. Petitioner cites approximately eight cases out of the Eighth Circuit in which the court found ineffective assistance of counsel, purportedly due to the misapplication of the Strickland test. Reading this argument between the lines, Petitioner appears to be arguing that under Kenley that the jailhouse door will be opened and every future capital litigant in the Eighth Circuit is going to be granted relief on their ineffective assistance of counsel claims. This view is incredible in light of the fact that Petitioner can cite only eight cases where habeas litigants have received relief on an ineffective assistance of counsel claim when there are undoubtedly hundreds of cases in the last ten years in which the Eighth Circuit has rejected such claims.

Indeed, Petitioner previously argued that recent case authority in the Eighth Circuit does not support the legal

conclusion reached in this case. The State argued and apparently believes that existing authority creates an almost insurmountable barrier to habeas relief. The Eighth Circuit, however, has found that failure to interview witnesses or discover mitigating evidence relates to trial preparation and not trial strategy. Chambers v. Armontrout, 907 F.2d 825, 828 (8th Cir.) (en banc), cert. denied, 111 S.Ct. 369, 112 L.Ed.2d 331 (1990).

The Eighth Circuit panel was clearly correct in stating that Kenley is an exceptional case involving a rare situation where ineffectiveness can be proven under the Strickland test. Kenley, 937 F.2d at 1309. The undivided panel opinion of the Eighth Circuit is consistent with the opinion of this Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Eighth Circuit's decision is correct and certiorari is unnecessary.

CONCLUSION

The United States Court of Appeals for the Eighth Circuit correctly applied the standards set forth for judging an ineffectiveness claim in Strickland v. Washington to the facts of this case. Petitioner has advanced no compelling reason for certiorari. Respondent respectfully suggests that Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that three true and correct copies of "Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit" in the case of Paul Delo, Superintendent, Potosi Correctional Center v. Kenneth L. Kenley, No. 91-483, were mailed, pursuant to Supreme Court Rule 29.5(b), postage prepaid, this 16th day of October, 1991, to:

William L. Webster, Attorney General
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Twelve copies of the above-referenced Brief were mailed to William Suter, Clerk, United States Supreme Court, pursuant to Supreme Court Rule 39.5, this date, the 16th day of October, 1991.

Thomas J. Cotter

THOMAS J. COTTER